BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: **FORKLIFT SALES OF SACRAMENTO, INC.** P.O. Box 2637 Fresno, CA 93725 Employer	Docket No. 05-R2D1-3477 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above entitled matter.

JURISDICTION

On May 26, 2005, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment maintained in California by Forklift Sales of Sacramento, Inc. (Employer).

On, August 30, 2005 the Division issued one citation to Employer alleging one serious violation of occupational safety and health standards codified in California Code of Regulations, Title 8, section 3704 [failure to secure a load against dangerous displacement].[1] Civil penalties of $21,600.00 were proposed.

Employer timely filed an appeal of the citations and asserted numerous affirmative defenses.

Administrative proceedings were held, which included an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After completion of the hearing the ALJ rendered her Decision on August 31, 2007. The Decision sustained the violation as serious but reduced the penalty based on Division's lack of evidence regarding various penalty adjustment factors in section 335.

[1] References are to California Code of Regulations, title 8 unless specified otherwise.

On October 4, 2007, Employer filed a Petition for Reconsideration, which was taken under submission on November 13, 2007. The Division filed an Answer on October 18, 2007.

Employer raises three issues in its petition. First, Employer asserts section 3704 applies only to transportation activities, and since the load in question was parked after being transported, section 3704 does not apply to the unsecured load that was the subject of the citation.[2] Second, Employer asserts the Division failed to provide sufficient evidence to support the serious classification. Last, Employer argues it had no knowledge of the condition, and so has established its affirmative defense to the serious classification.

Division answers that transportation of loads includes loading and unloading of loads, and so the safety order applied to the unsecured load that was still on the transport vehicle. Second, Division points to its witness's experience assisting injured workers as sufficient to prove the probable nature of injuries resulting from failing to secure heavy loads. Last, Division argues Employer failed to act reasonably in remaining ignorant of the violative condition to which its worker was exposed, and thus has not established its statutory defense to the serious classification.

EVIDENCE

The Decision accurately summarizes the hearing record. The record consists of testimony of the Division inspector, Robert Roberts, and the injured worker, Loren Roose. Roose drew a diagram of the vehicle and its load which was the condition alleged to be in violation of section 3704. This diagram is also part of the record.

Employer sells, rents, delivers and services forklifts and other industrial trucks, including pallet jacks. Employee Roose worked first as a delivery driver, and then as a preventative maintenance and repair technician for Employer. In this later position, he travelled to customers' business locations to service and repair Employer's rented and sold equipment and vehicles.

On the day of the accident which was the subject of the investigation and citation, he was performing a repair on a pallet jack. A pallet jack is a type of walk-behind vehicle with an electric motor and hand controls at one end, and forks at the other, used to pick up pallets. Because it is battery-operated, the pallet jack is very heavy on the controls/engine/battery end, and very light on the forks end. The contemplated repair was to the wheels under the distal, light ends of the forks.

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[2] Although Employer raised multiple affirmative defenses in its appeal, only the defense of the incorrect safety order was preserved for reconsideration. All issues not preserved by petition for reconsideration are deemed waived. (Labor Code 6618.)

To transport the pallet jack to his work truck where he planned to undertake repairs, Roose used the customer's forklift. He placed the forks of the forklift under the pallet jack, raised the load 2 inches, drove the forklift 200 yards to his service truck, and stopped the forklift. He raised the load approximately two additional feet, maybe more, turned off the forklift, got out, walked by the heavy side of the pallet jack, i.e. the controls/engine/battery end, at which moment it fell off the forklift and on to his lower leg, seriously injuring him. He was walking past the load to go to his truck to retrieve two chains to secure the pallet jack to the forks of the forklift before he began his repair.

Roose was certified to operate all sizes of forklift. He was never specifically instructed to secure pallet jacks before raising them either two inches or two feet. He was never instructed on whether or how to secure loads to forklifts. He had transported pallet jacks like this (on the forks, two inches off the ground) many times either for repair, or for transportation and delivery in his previous position with Employer as a truck driver. Employer never observed Roose performing this specific wheel-repair task, though it sent him on the service call. Raising the forklift was required in order to repair the wheels as requested by the customer. So raising the forklift was not required to deliver a pallet jack. In the year or so prior to the accident that Roose worked as a repair and service technician, he performed a wheel repair on a pallet jack only a few times. He raised a pallet jack with a forklift during these few previous repairs. He was never told how or whether to secure the pallet jack to a forklift in order to perform the wheel repairs. No supervisor accompanied him on any service calls to repair pallet jacks or otherwise.

Division's witness testified as indicated in the decision regarding his experience based rationale for classifying the violation as serious. Division's witness testified he had spent 15 years as a workers' compensation rehabilitation counselor, working with hundreds of injured people concerning the details of their injuries. He estimated approximately 5-10 percent of his counseling clients were workers injured by falling objects weighing several hundred pounds or more, and that such injuries were serious, involving concussions, broken bones, and extended stays in the hospital.

The pallet jack that fell on Roose weighed between 1200 and 1500 pounds.

ISSUES

1. Does section 3704 apply to the hazard established by Division?

2. Was the serious classification properly upheld?

DECISION AFTER RECONSIDERATION

1. Section 3704, a General Industry Safety Order requiring any load be secured, is not limited to transportation related loads.

Employer asserts that the headings in Title 8 control or limit the applicability of the Safety Order to transportation activities, and then argues for a narrow definition of what activity constitutes "transportation." Both of these arguments have been previously rejected by the appeals board.

Recently, in *PMR RACE CARS*, Cal/OSHA App. 03-1825 Decision After Reconsideration (Dec. 2, 2009), the Board stated that the headings may be helpful in the case of an ambiguous Safety Order but do not limit the terms of the Safety Orders. (*Id.*)

As we said in *PMR Racecars:*

> [T]he Board has recognized the general rule of statutory construction under which a regulatory title may be used to interpret a safety order if the safety order's language is vague and ambiguous. *Spaich Brothers, Inc. dba California Prune Packing Co.*, Cal/OSHA App. 01-1630, Decision After Reconsideration (Feb. 25, 2005), citing, *Central Coast Pipeline Construction Co. Inc.*, Cal/OSHA App. 76-1342, Decision After Reconsideration (Jul. 16, 1980); *Bryant Rubber Corp.*, Cal/OSHA App. 01-1358, Decision After Reconsideration (Aug. 21, 2003). Generally, section headings or titles may not otherwise be used for the purpose of controlling, restraining, or enlarging the positive provisions in the body of the regulation. *Id.*
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> The present case closely resembles the one before the Board in *Spaich Brothers, supra*, where the Board found the employer's prune dryers were covered by section 4530, which was entitled "Bakery Ovens." The Board found the safety order's language unambiguous, which obviated the need for interpretation. As a result, the regulation's heading could not be used to restrict or control its coverage and, despite the regulatory title, the safety order was found to govern the prune dryers. See also, *Cambro Manufacturing Company*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986) (violation of section 4227, found in Article 56, Metal Working Equipment, upheld despite employer's use of a sheet metal sheer to cut fiberglass).

> While article headings and titles can, at times, be helpful to understand a regulation or article's intended scope, the titles are not dispositive.

(*PMR RACE CARS, supra.*)

Although this Safety Order does appear in the section of the General Industry Safety Orders entitled "Transportation," we have stated that this section is not limited to transportation of loads. "While many of the provisions of Article 27 refer to the use of motor vehicles to transport employees and materials, nothing in Article 27 or section 3704 restricts section 3704 to motor vehicle operations." (*Carris Reels of California*, Cal/OSHA App. 95-1456, Decision After Reconsideration (Dec. 6, 2000).)

The language of 3704 states: "All loads shall be secured against dangerous displacement either by proper piling or other securing means." The requirement to secure a load before transporting it is preventative in nature, and has been required even without the Employer having any indication that the load could become unstable or displaced. (*Traylor Bros. Inc.*, Cal/OSHA App.98-2345, Decision After Reconsideration (Jun. 12, 2002) [construing the same language in § 1593(f), i.e. "loads shall be secured against displacement."]) The words "secured against displacement" require that "the load be safe from the type of movement that may . . . occur" at any time. (*Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001) construing §1593(f) ["Unstable Loads"].) Language appearing in one enactment which is identical to that of another enactment should be given the same meaning. (*Outdoor Resorts etc. Owners' Assn. v. Alcoholic Beverage Control Appeals Board* (1990) 224 Cal App. 3d 696, 701.)

The Employer points to no reading of the Safety Order that makes it ambiguous, and we find none. As such, there is no need to look to section headings for the meaning of the Safety Order. Therefore, the Safety Order applied to the load in question regardless of whether the load was in transportation.

Next, Employer argues that since the injury occurred after the forklift was parked, the transportation Safety Order is inapplicable because transportation had concluded at the time of the injury. Even if the Safety Order was limited to transportation activities, the Board has, in the past, consistently concluded that transportation includes the loading and unloading of transportation vehicles. (*Oakmont Holdings, Inc*, Cal/OSHA App. 04-1951, Decision After Reconsideration (Feb. 8, 2007).) For example, Safety Orders covering storage of materials do not become operative until the storage activity has begun, which is at the conclusion of the transportation activity. In *Hood Corporation*,

Cal/OSHA App. 85-673, Decision After Reconsideration (Dec. 2, 1987), the Safety Order requiring *stored* loads be made secure against disengagement was not the right Safety Order when the unstable material was still on the parked truck. In that circumstance, 3704 was the correct Safety Order.

> In the instant matter, pipes transported to the site were being unloaded when they became unstable and rolled off the truck. By removing bands, without first taking measures to insure the pipes did not disengage, the load was made unsecured against dangerous displacement during transportation; however, inasmuch as the materials were not in storage, a violation of Section 1549(c) cannot be sustained. The appeal is granted.

(*Hood Corporation, supra.*). There, the transportation vehicle was parked and materials were being unloaded. Likewise, here, the transported item, the pallet jack, was still on the transportation vehicle, the forklift, and so the Safety Order requiring securing loads against displacement applied even if it is limited to "transportation" activity.

Thus, Employer's contention that the ALJ erred by not limiting section 3704's application to conditions existing during transportation is unfounded. There is no such limitation in the Safety Order. The ALJ was correct in concluding that section 3704 applied to the pallet jack loaded on the forklift, and that the failure to secure the load before moving it and then raising it two feet established a violation.

2. Serious classification.[3]

Employer contends the Division produced insufficient evidence of the serious classification. In order to prove that a violation is serious, the Division must provide evidence that, assuming an accident or exposure results from the violation, the result of such accident is more likely than not to be death or serious injury, as that term is defined (i.e. resulting in permanent loss or disfigurement, or hospitalization for more than 24 hours for more than observation.) (*BLF Inc,* Cal/OSHA App. 03-4428, Decision After Reconsideration (Jan. 21, 2011); *MV Transportation, Inc.*, Cal/OSHA App. 02-2930, Decision After Reconsideration (Dec. 10, 2004), citing *Findly Chemical Disposal, Inc.*, Cal/OSHA App. 91-431, Decision After Reconsideration (May 7, 1992).)

[3] We note Labor Code 6432 has been substantially revised since the hearing in this case. The revised statute applies to incidents occurring after the effective date of the revision (January 1, 2011) since the statute does not indicate it applies retroactively. (*McClung v. Employment Development Department* (2004) 34 Cal. 4th 467, 475.)

An opinion about the substantial probability of serious physical harm or death must be based upon a valid evidentiary foundation, such as expertise on the subject, reasonably specific scientific evidence, an experience-based rationale, or generally accepted empirical evidence. (*R. Wright & Associates, Inc., dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 11, 1999).) Here, the Division's witness testified regarding his experience with injuries resulting from heavy objects falling on workers. As a rehabilitation counselor for 15 years, he counseled injured workers and in so doing studied hundreds of injury case files. He estimated 10-15 percent were injuries resulting from heavy objects falling on people. He recalled items of several hundred pounds causing broken bones and the need for extended hospital stays. Based on that experience, he concluded this 1200 to 1500 pound pallet jack, if it fell on someone, would cause injuries such as broken bones, concussion, and extended stays in the hospital (we take "extended" to mean in excess of 24 hours for treatment of the injuries).

This testimony provides an experience-based rationale for the Division witness's opinion that serious injuries could result from an accident, to a substantial probability.[4] Although not an overwhelming amount of evidence, in light of a complete lack of evidence to contradict it, the experience-based opinion testimony is sufficient to establish that if an accident were to occur from the failure to secure a 1200 to 1500 pound load against dangerous displacement, that, like other injuries known to the inspector wherein employees were struck by loads of less weight and suffered broken bones and "extended" hospital stays the resulting injury could "likely" or "more likely than not" be serious. (Labor Code 6432; *Petrolite Corporation*, Cal/OSHA App. 98-2512, Decision After Reconsideration (Mar. 12, 2002).)[5]

As an affirmative defense, an Employer may still overcome the serious classification if it proves it did not know of the violative condition, and with the exercise of reasonable diligence, could not have known of the violative condition. (*John Laing Homes*, Cal/OSHA App. 04-0194, Decision After Reconsideration (Jan. 20, 2011.) Reasonable diligence requires proof of the employer's conduct vis à vis the employee's work where the violation occurred. (*Roof Structures*, Cal/OSHA App. 91-316, Decision After Reconsideration (Oct.

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[4] The Board has repeatedly held that opinions regarding the probability of serious injury must be supported by reasonably specific scientific or experienced based rationale, or generally accepted empirical evidence. (e.g., *Brydenscot Metal Products*, Cal/OSHA App. 03-3554, Decision After Reconsideration (Nov. 02, 2007); *MV Transportation, Inc., supra; R. Wright & Associates, Inc., dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999); see also, *Ja Con Construction Systems, Inc. dba Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006).) (*Webcor Builders, Inc.*, Cal/OSHA App. 06-3031 Decision After Reconsideration (Jan. 11, 2010).)

[5] It is not entirely clear that expert opinion is required to prove that a 1200+ pound pallet jack that became dislodged from a forklift would more likely than not cause serious injury if an accident were to occur as a result of the failure to secure the load, as that result is probably a matter easily understood by a layperson. See Witkin, California Evidence, *Opinion Evidence* §29 (2008).

29, 1992).) If an employer is prevented from detecting the violation, it may be reasonably unaware of the existence of the violation sufficient to reduce the classification. (*Trio Metal*, Cal/OSHA App. 03-0317, Decision After Reconsideration (Feb. 25, 2009.) Failure to inspect the employee's work demonstrates a lack of adequate supervision. (*Sunrise Windows*, Cal/OSHA App. 00-3220, Decision After Reconsideration (Jan 23, 2003).)

On this record, Employer's purported lack of knowledge of Roose's failure to secure the load to the forklift appears to be a result of its failure to ever supervise Roose while working, or to train him on how and when to secure loads. Roose testified Employer never inspected his work, or actually supervised him in the field. He was never told to secure loads before moving them. And, Employer neither instructed nor observed Roose regarding movement of a pallet jack to his work truck to effect assigned repairs. Employer offered no evidence to contradict this testimony. Thus, Employer has failed to provide evidence that it acted reasonably in remaining without knowledge of the existence of this violative condition.

Decision

Since both Employer and the Division have waived any arguments that the penalty calculation is in error, we affirm the penalty calculation in the Decision. Thus, we conclude section 3704 applied to the condition alleged in the citation, the Division presented sufficient evidence to establish the serious classification thereof, and that Employer offered no evidence that it acted reasonably in remaining ignorant of the existence of the violation. We hereby deny Employers appeals and impose a penalty of $14,400.00.

ART R. CARTER, Chairman

CANDICE A. TRAEGER Member

ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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